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No. 94-1372

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ALLEN M. WAMSLEY, *et al.*,
Petitioners,
v.
CHAMPLIN REFINING & CHEMICALS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Older Workers Benefit Protection Act forecloses application of the traditional common law doctrines of ratification and estoppel in the context of allegedly unenforceable contracts for the release of claims under the Age Discrimination in Employment Act.

PARTIES TO THE PROCEEDINGS

Petitioners, appellants below, are Allen M. Wamsley, Glenda K. Bennett, Donald J. Whittenberg, Anthony J. Nagy, and Betty R. Sanderson.

Respondents, appellees below, are Champlin Refining and Chemicals, Inc. ("Champlin"), CITGO Petroleum Corporation ("CITGO"), and the Termination Pay Plan for Salaried Employees of Champlin Refining and Chemicals, Inc. Located in the Company's Las Colinas Office (the "Termination Pay Plan"). Pursuant to Supreme Court Rule 29.1, respondents disclose that they have no parent companies or subsidiaries with publicly traded shares.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

The Older Workers Benefit Protection Act ("OWBPA") codifies, in the context of claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, the venerable common law principle that any "waiver" of claims or causes of action must be "knowing and voluntary." 29 U.S.C. § 626(f)(1). This case presents the question whether the OWBPA also forecloses, in the context of claims under ADEA, the entirely separate and distinct common law principle, reflected in the doctrines of ratification and estoppel, that a plaintiff may not pursue claims covered by an allegedly invalid release (*i.e.*, a contractual "waiver") while simultaneously retaining, and thus failing to tender back, the consideration received in exchange for the release. The court below correctly concluded that the OWBPA does not foreclose

application of the doctrines of ratification and estoppel in the ADEA context.

1. Petitioners are five former employees of respondent Champlin Refining and Chemicals, Inc. ("Champlin"). In September 1990, a decision was made that Champlin and a corporate affiliate, respondent CITGO Petroleum Corporation ("CITGO"), would consolidate certain operations and that the Champlin office where petitioners had worked would be closed. Pet. App. 2a. In November and December 1990, Champlin informed petitioners that their employment would be terminated as a result. *Id.*

As part of the closing of the facility, Champlin offered a substantial package of severance benefits to affected employees who would agree, in exchange for the benefits, to release Champlin from any claims or causes of action arising out of their employment or termination, including claims under ADEA. Pet. App. 4a. To provide these severance benefits, Champlin created respondent Termination Pay Plan for Salaried Employees of Champlin Refining and Chemicals, Inc. Located in the Company's Las Colinas Office (the "Termination Pay Plan"). Pet. App. 2a.

Champlin gave affected employees both a proposed release of claims and a written notice explaining the release. Pet. App. 2a-4a. Most relevant here, the notice informed employees that they could "take up to 45 days" to "consider" whether to sign the release. Opp. App. 1a.[1] The notice also "advised" employees "to consult with an attorney prior to executing the [r]elease," and it informed employees that an executed release would be revocable for up to seven days. *Id.* The release encompassed ADEA claims explicitly (Opp. App. 2a), and it contained an affirmation that the employee "ha[d] not relied on any

[1] "Opp. App." refers to the appendix to this Brief in Opposition, which contains portions of the Record Excerpts filed by respondents, as appellees, in the court of appeals below.

representation, promise of future benefit, or statement of the Company or any person representing the Company, written or oral, not set forth in this document or the Termination Pay Plan" (Opp. App. 3a).

Petitioners signed releases in November or December 1990. As a result, they received severance payments totalling over $283,000, outplacement services, and extended medical, dental and life insurance benefits. Pet. App. 4a n.4.

2. In January 1992, however, petitioners filed this lawsuit against respondents, alleging that their terminations violated ADEA. Pet. App. 5a. Petitioners sought to invalidate their releases as not "knowing and voluntary" within the meaning of the OWBPA, which requires that any contractual "waiver" of an ADEA claim must be "knowing and voluntary," and which imposes eight specific requirements that a "waiver" must satisfy in order to be "knowing and voluntary." 29 U.S.C. § 626(f)(1).

Specifically, petitioners argued that their releases did not satisfy 29 U.S.C. § 626(f)(1)(F), which requires employees to be "given a period of at least 45 days within which to consider the agreement." Before the district court, petitioners argued that Section 626(f)(1)(F) required Champlin "to keep them on the payroll throughout this forty-five day period." Pet. App. 25a n.3. In the alternative, petitioners argued that, even if their releases satisfied all of the specific requirements in the OWBPA, they still were not "knowing and voluntary" because of petitioners' alleged economic "duress." Pet. App. 5a. However, despite seeking to avoid their obligations under the allegedly invalid releases, petitioners never offered to return to Champlin any of the severance benefits that they had received as consideration for those releases. Pet. App. 6a.

The district court granted summary judgment to respondents. The court rejected petitioners' contention that their releases were not "knowing and voluntary" because

Section 626(f)(1)(F) prohibited Champlin from terminating petitioners before the 45-day period had run. Pet. App. 24a-25a. In the alternative, the court held that, even if the releases had not been "knowing and voluntary" when entered, petitioners' retention of the "benefits received as consideration" nonetheless created a common law bar to their claims. Pet. App. 25a. Although the district court expressly referenced only the common law doctrine of ratification (Pet. App. 25a-26a), it cited prior Fifth Circuit precedent, *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 220 (5th Cir. 1991), that, in turn, cited prior Fourth Circuit precedent explaining that ratification "is based upon the principle of estoppel." *Rachesky v. Finklea*, 329 F.2d 606, 609 (4th Cir. 1964).

3. The court of appeals affirmed. In that court, petitioners alleged that their releases did not satisfy Section 626(f)(1)(F), and thus were not "knowing and voluntary," because respondents had "orally countermanded" the written notice providing petitioners the requisite 45 days to consider respondents' offer. Pet. App. 7a. The court of appeals held that this allegation was enough to create a genuine factual dispute about whether the releases were "knowing and voluntary" (*id.*), even though the releases themselves specifically excluded any "written or oral" statement not "set forth in" the applicable documents (Opp. App. 3a), and even though the "documentary evidence" showed the written notices and releases "to have been in letter perfect compliance with Section 626(f)(1)" (Pet. App. 11a n.9). Nonetheless, the court held that, even if the releases had not been "knowing and voluntary" when executed, respondents' claims still were barred by their subsequent refusal to tender back the benefits paid to them as consideration for the releases. Pet. App. 9a-13a.

The court of appeals rejected petitioners' contention that the OWBPA forecloses application of the common law doctrines of ratification and estoppel in the ADEA

context. The court explained that nothing in the text of the statute, which regulates only the circumstances under which a "waiver" is deemed "knowing and voluntary" (Pet. App. 8a-9a), addresses the separate and distinct question whether petitioners' claims should be barred by their "subsequent conduct"—to wit, their decision "to retain and not tender back to Champlin the benefits paid them in consideration" for the allegedly invalid releases. Pet. App. 12a-13a & nn. 10-11. The court found that the legislative history of the OWBPA confirms that the statute was not intended to prevent waivers generally, but only contractual waivers tainted by fraud, duress or mistake—all of which traditionally have been subject to the doctrine of ratification. Pet. App. 10a n.8 (citing S. Rep. No. 101-263, 101st Cong., 2d Sess. 31-32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1537). Finally, the court explained that the doctrines of ratification and estoppel are fully consistent with the underlying purpose of ADEA to promote the voluntary settlement of disputes, since employers "clearly . . . would be disinclined to propose such solutions" under the rule urged by petitioners. Pet. App. 11a. The court repeatedly stated that, while the "allegedly voidable waiver agreements" might or might not be enforceable as such, its decision to bar the claims rested on petitioners' "subsequent conduct" in refusing to tender back the consideration paid for those agreements. Pet. App. 13a n.11.

The court of appeals also rejected petitioners' contention that this Court's decision in *Hogue v. Southern Railway*, 390 U.S. 516 (1968) (per curiam), which by its terms applies only to claims under the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, should be extended to the ADEA context. In *Hogue*, this Court held that a plaintiff raising FELA claims need not "tender back" the benefits received as consideration for a release allegedly invalid on the ground of mutual mistake. *See* 390 U.S. at 517. Declining to extend *Hogue*, the court found several "fundamental differences"

between FELA and ADEA. Pet. App. 19a. In particular, the court stressed that, while ADEA was designed simply "'to prohibit *arbitrary* age discrimination in employment,'" (Pet. App. 18a (quoting 29 U.S.C. § 621(b) (emphasis added))), FELA was designed "not simply to discourage negligent conduct," but also to affirmatively "facilitat[e] recovery by injured railroad workers against their employers," a broad redistributionist objective achieved in part by the express statutory abrogation of several common law defenses. Pet. App. 15a, 17a-18a. Since ADEA was not designed to "actively facilitate" employees' recovery (Pet. App. 18a), the court concluded that *Hogue* was inapposite.

REASONS FOR DENYING THE WRIT

Petitioners repeatedly mischaracterize the question decided by the court of appeals and now placed before this Court. That question is not, as they contend, whether allegedly invalid "releases" should be "enforced" (Pet. 6), or whether allegedly invalid "releases" are nonetheless "effectiv[e]" (Pet. 12). Rather, the question is whether petitioners may prosecute claims plainly covered by their allegedly invalid releases, while at the same time keeping the consideration that was paid to them for those releases. The court below correctly held that the OWBPA does not entitle petitioners, in the words of the Seventh Circuit, to so "have their cake and eat it." *Fleming v. United States Postal Service AMF O'Hare*, 27 F.3d 259, 260-61 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 741 (1995). And, contrary to petitioners' arguments, the decision below does not create a judicial conflict that warrants review by this Court at this time. Accordingly, the petition should be denied.

I. THE OWBPA DOES NOT FORECLOSE APPLICATION OF THE TRADITIONAL COMMON LAW DOCTRINES OF RATIFICATION AND ESTOPPEL IN THE ADEA CONTEXT

Petitioners err in suggesting that the OWBPA forecloses application of the traditional common law doctrines of ratification and estoppel in the ADEA context. By its terms, the OWBPA merely codifies a centuries-old principle, in the context of claims under ADEA, that a "waiver" must be "knowing and voluntary." 29 U.S.C. § 626(f)(1). In contending that this provision somehow abrogates the equally venerable common law principles of ratification and estoppel, petitioners not only give short shrift to the words of the statute, but entirely ignore both the common law background against which the statute was enacted and the interpretive principles that apply to common law abrogation claims such as theirs. Petitioners' various other arguments—based on the legislative history of the OWBPA, the alleged analogy to *Hogue*, the alleged disuniformity of applicable common law standards, and petitioners' own policy judgments about the wisdom of the common law—are also clearly without merit.

1. Petitioners do not, and could not, dispute that their claims would be barred if the traditional common law doctrines of ratification and estoppel are applicable. At common law, releases tainted by fraud, mistake or duress, like all other contracts, are voidable at the option of the defrauded, mistaken or coerced party. *See, e.g., Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1455 (9th Cir. 1988) (Guam law); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1368 (6th Cir. 1975) (federal common law under ADEA). But just as such releases can be avoided, they also can be ratified: "the releasor who retains consideration after learning that the agreement is voidable has effectively ratified the release and may not later avoid its terms." *Cumberland & Ohio Co. of Texas, Inc. v. First American Nat'l Bank*, 936 F.2d 846, 850 (6th Cir.

1991) (Tennessee law), *cert. denied*, 112 S. Ct. 878 (1992).[2]

Ratification does not constitute enforcement of the release as a contractual obligation. Rather, it rests on the distinct principle, which the court below correctly identified (Pet. App. 12a-13a), that " '[a] party cannot claim benefits under a transaction or instrument and at the same time repudiate its obligations.' " *Dahlstrom Corp. v. State Highway Comm'n*, 590 F.2d 614, 616 (5th Cir. 1979) (Mississippi law) (citation omitted). Ratification, in other words, is based on principles of estoppel: the underlying claim is barred not because the plaintiff executed an allegedly invalid contractual *waiver*, but because the plaintiff's *subsequent conduct*—in retaining the consideration paid to obtain the waiver—makes prosecution of the underlying claim fundamentally unfair. *See, e.g., Cumberland & Ohio Co.*, 936 F.2d at 850; *In re Texas Mortgage Servs. Corp.*, 761 F.2d 1068, 1076 (5th Cir. 1985) (Texas law); *Rachesky v. Finklea*, 329 F.2d at 609 (South Carolina law).

Before the OWBPA was enacted, courts repeatedly applied these principles in the specific context of releases of claims under ADEA. *See, e.g., O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, 362 (4th Cir.) ("It is a well-established proposition that the retention of the benefits of a voidable contract may constitute ratification."), *cert. denied*, 502 U.S. 859 (1991); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d at 220 ("A party cannot be

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[2] *See, e.g., Fleming*, 27 F.3d at 260 (Illinois law); *In re Boston Shipyard Corp.*, 886 F.2d 451, 455 (1st Cir. 1989) (federal common law for government contracts); *Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir. 1985) (Missouri law); *Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 752 F.2d 178, 182 (5th Cir. 1985) (Texas law); *DiRose v. PK Management Corp.*, 691 F.2d 628, 633 (2d Cir. 1982) (New York law), *cert. denied*, 461 U.S. 915 (1983); *Dahlstrom Corp. v. State Highway Comm'n*, 590 F.2d 614, 616 (5th Cir. 1979) (Mississippi law).

permitted to retain the benefits received under a contract and at the same time escape the obligations imposed by the contract.").[3]

2. a. Although they contend that the OWBPA abrogates these settled common law doctrines in the ADEA context, petitioners ignore the basic interpretive rules that must govern any such claim. "[W]here a common-law principle is well established the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citations omitted). Indeed, this Court repeatedly has made it clear that, "[i]n order to abrogate a common law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 113 S. Ct. 1631, 1634 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). *See also Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983) ("It is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed to be repealed unless the language of a statute be clear and explicit for this purpose.'" (citation omitted)).

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[3] *See also Haslach v. Security Pacific Bank Oregon*, 779 F. Supp. 489, 493 (D. Or. 1991) ("Th[e] retention of the benefits [received for signing a release] is sufficient to amount to a ratification of the release agreement, regardless of whether it was initially signed under duress or misrepresentation."); *Alphonse v. Northern Telecom. Inc.*, 776 F. Supp. 1075, 1079 (E.D.N.C. 1991) ("By accepting and retaining the benefits of a release, a party to a voidable release ratifies the release and cannot avoid its obligations."); *Ponsoni v. Kraft General Foods, Inc.*, 774 F. Supp. 299, 316 (D.N.J. 1991) ("The acceptance of benefits ratifies the release of ADEA claims."), *aff'd*, 968 F.2d 14 (3d Cir. 1992); *Widener v. Arco Oil & Gas Co.*, 717 F. Supp. 1221, 1216 (N.D. Tex. 1989) ("[I]f the releasor retains the consideration after he learns that the release [is] voidable, his continued retention of the benefits constitutes a ratification of the release.").

This Court repeatedly has applied these familiar interpretive principles to the federal antidiscrimination statutes. Specifically, the Court has made clear that, absent a clear statutory intent to abrogate, provisions in such statutes, like those in any other statute, remain subject to background common law principles such as waiver, ratification or estoppel. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-27 (1991) (right to trial subject to waiver in favor of arbitration); *Zipes v. Trans World Airlines*, 455 U.S. 385, 393-94 (1982) (limitations defenses subject to waiver, estoppel, and equitable tolling); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 373 (1977) (EEOC right of action subject to laches); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975) (private right of action subject to laches).

b. Nothing in the OWBPA "speaks directly" to, much less rejects, the settled common law principles of ratification and estoppel. The OWBPA merely provides that "[a]n individual may not waive any right or claim" under ADEA "unless the waiver is knowing and voluntary," and it specifies certain "minimum" requirements that waivers must satisfy in order to be "knowing and voluntary." 29 U.S.C. § 626(f)(1). It says absolutely nothing about abrogation of the distinct doctrines of ratification and estoppel.

In arguing to the contrary, petitioners urge that the OWBPA modifies antecedent common law standards. In large measure, however, the OWBPA merely *codifies* settled principles of federal common law, under which any waiver of statutory or constitutional rights, by contractual release or otherwise, must be knowing and voluntary. *See, e.g., United States v. Mezzanatto*, No. 93-1340, 63 U.S.L.W. 4060, 4061-62 (U.S. Jan. 18, 1995) (Slip Op. at 4-5); *Newton v. Rumery*, 480 U.S. 386, 393 (1987); *Moran v. Burbine*, 475 U.S. 412, 427 (1986); *Alexander v. Gardner-Denver*, 415 U.S. 36, 52 & n.15 (1974); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938). Moreover, the specific OWBPA standards for determining

whether a contractual waiver is "knowing and voluntary" largely mirror the common law standards that many courts of appeals previously had used for that purpose. *See, e.g., O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1017 (5th Cir. 1990); *Bormann v. AT&T Communications, Inc.*, 875 F.2d 399, 401-02 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989); *Coventry v. United States Steel Corp.*, 856 F.2d 514, 517 (3d Cir. 1988).

At common law, for example, courts had considered "the clarity of the written agreement" (*O'Hare*, 898 F.2d at 1017); under the OWBPA, a waiver must be "written in a manner calculated to be understood" (29 U.S.C. § 626(f)(1)(A)). At common law, courts had considered "whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled" (*O'Hare*, 898 F.2d at 1017); under the OWBPA, the waiver must be "in exchange for consideration in addition to anything of value to which the individual already is entitled" (29 U.S.C. § 626(f)(1)(D)). At common law, courts had considered whether an employee "was represented by or consulted with an attorney" (*O'Hare*, 898 F.2d at 1017); under the OWBPA, an employee must be "advised in writing to consult with an attorney" (29 U.S.C. § 626(f)(1)(E)). At common law, courts had considered "the amount of time the plaintiff had possession of or access to the agreement before signing it" (*O'Hare*, 898 F.2d at 1017); under the OWBPA, an employee must be given a specified period of time to consider the waiver (29 U.S.C. § 626(f)(1)(F)). In short, the OWBPA is hardly the emphatic repudiation of the common law that petitioners would make it out to be.

In any event, however, even to the extent that the OWBPA reflects a modest "stiffening of the requirements necessary to uphold a release" (Pet. 18), that "stiffening" occurs only in connection with the question whether a release is "knowing and voluntary," not in connection

with the separate question whether petitioners' subsequent conduct may create a bar under the doctrines of ratification or estoppel. The principle that a waiver is invalid unless "knowing and voluntary" has long co-existed with the separate, independent, and distinct principle that a release tainted by fraud or mistake (and thus not "knowing") or by duress (and thus not "voluntary") is nonetheless subject to ratification or estoppel by virtue of subsequent conduct. Both principles, as we have shown, are independent and long-established fixtures of the common law. The OWBPA addresses only the former, and not the latter.[4]

At bottom, petitioners' argument that ratification and estoppel "would make effective what the OWBPA states cannot be effective" (Pet. 16) simply confuses the waiver question addressed by the statute and the ratification and estoppel question addressed by the court of appeals. The statute regulates only the contractual "waiver" itself, as confirmed by its repeated usage of terms like "agreement" and "consideration" in setting forth requirements for the "waiver" to be "knowing and voluntary." 29 U.S.C. § 626(f)(1). The statute does *not* regulate any misnamed "waiver" that might arise out of subsequent and unilateral conduct by employees—such as the failure to file a timely complaint, to preserve an issue below, to raise an issue on appeal or, as here, to tender back the consideration given to them—all of which, in any event, are more accurately characterized not as waivers, but as forfeitures "by other means." *See Freytag v. Commissioner of Inter-*

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[4] In setting forth uniform federal standards for deciding whether an ADEA waiver is "knowing and voluntary," the OWBPA does clearly reject the approach of some courts of appeals which had held that state law should govern that determination. *See O'Shea v. Commercial Credit Corp.*, 930 F.2d at 362; *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 541 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1045 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986).

nal Revenue, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment).

The OWBPA simply does not purport to abrogate the various doctrines that impose such forfeitures "by other means." On the contrary, the OWBPA leaves untouched the ADEA's general grant of equitable power to the courts. *See* 29 U.S.C. § 626(b) (courts "shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of th[e] chapter"). Equitable power implies not only the discretion to apply specific common law doctrines such as ratification and estoppel (*see, e.g., Zipes*, 455 U.S. at 393-94 (waiver, tolling and estoppel); *Occidental Life Ins. Co.*, 432 U.S. at 373 (laches)), but an even broader discretion to deny remedies that would be unjust under all the relevant circumstances. *See, e.g., McKennon v. Nashville Banner Pub. Co.*, No. 93-1543, 63 U.S.L.W. 4104, 4107 (U.S. Jan. 23, 1995) (Slip Op. at 10) (courts under ADEA "can consider taking into account further extraordinary equitable circumstances that affect the legitimate interests of either party"). *See also Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982); *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944); Pet. App. 13a ("The court will enforce [petitioners'] new conduct-based promises as it legally *and equitably* should." (emphasis added)). The court of appeals was thus fully empowered to bar petitioners from proceeding absent a tender back of the benefits previously paid to them.

3. Finally, petitioners advance a series of arguments based on the legislative history of the OWBPA, the alleged analogy to *Hogue*, the disuniformity that the ruling below allegedly will produce, and petitioners' own policy judgment that the doctrines of ratification and estoppel are unwise. These arguments conflict with the controlling interpretive and textual commands discussed above and, accordingly, are legally insufficient to support petitioners' claim. In any event, none of them has any merit.

a. The only piece of legislative history cited by petitioners is a statement from a Senate Report that the OWBPA was designed to provide "informational requirements" in order to facilitate "more informed decisions." Pet. 23 (quoting S. Rep. No. 101-263, 101st Cong., 2d Sess. at 34, *reprinted in* 1990 U.S.C.C.A.N. at 1539). Like the text of the statute itself, however, this statement simply does not address any question about the doctrines of ratification and estoppel. Moreover, the very report cited by petitioners further provides that:

> At a minimum, the waiving party must have genuinely intended to release ADEA claims and must have understood that he was accomplishing this goal. The individual also must have acted in the absence of fraud, duress, coercion, or mistake of material fact.

Id. at 31-32, *reprinted in* 1990 U.S.C.C.A.N. at 1537. As the court below recognized (Pet. App. 10a), Congress's concern about fraud, duress and mistake *strengthens* the case for applying doctrines of ratification and estoppel, because, as explained above, these doctrines traditionally have applied to contracts voidable on those grounds.[5]

b. Petitioners also contend that the OWBPA should be construed as the FELA was construed in *Hogue*. Pet. 27-30. In *Hogue*, this Court held that a plaintiff, in order to prosecute claims under FELA, need not tender back the consideration paid to him for a release allegedly in-

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[5] As two principal architects of the OWBPA later confirmed:

> Nothing in the OWBPA alters the doctrine of ratification. OWBPA addresses only the circumstances under which a release or waiver may be held invalid. It does not address the circumstances in which an otherwise invalid release may be enforced because, for example, it has been ratified.

Letter from Sen. Hatch and Rep. Goodling to Office of Executive Secretariat, EEOC at 10 (Aug. 17, 1992). Although not dispositive, this post-enactment expression of congressional intent is entitled to respectful consideration. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982).

valid on the ground of mutual mistake. *See* 390 U.S. at 517. For several reasons, however, petitioners' proposed analogy to *Hogue* is unsound.

To begin with, *Hogue* on its face is a poor candidate for the dramatic extension, from the FELA to the ADEA, urged by petitioners. In *Hogue* itself, after this Court granted certiorari, the respondent employer purported to confess error and refused to present either briefing or oral argument on the tender requirement at issue there. *See id.* at 516. The Court issued a terse three-page *per curiam* opinion, rendered without the benefit of adversary presentation and limited by its terms to claims under FELA and releases challenged on the ground of mutual mistake. *See id.* at 517. Not surprisingly, petitioners can cite no other decision of this Court, in the quarter-century since *Hogue* was decided, or in the two centuries before it was decided, foreclosing application of the doctrines of ratification and estoppel in any other context.

Moreover, the court below correctly concluded that *Hogue*'s FELA holding cannot fairly be extended beyond the "unique" context (Pet. App. 15a) of that particular statute. The FELA provides a federal remedy for railroad workers injured by the negligence of their employer. As the court below explained, however, the FELA was designed not only to "discourage negligent conduct" by employers, but to actively "facilitat[e] recovery by injured railroad workers." *Id. See, e.g., Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958) (FELA designed "to provide for liberal recovery"). To achieve that goal, a "primary purpose" of the statute was "to eliminate a number of traditional defenses to tort liability." *Atchison T. & S.F. Ry. v. Buell*, 480 U.S. 557, 561 (1987). *See also Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 507-08 (1957) ("The employer is stripped of his common law defenses."). In particular, the FELA expressly states that "[a]ny contract, rule, regulation or

device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created under this chapter, shall to that extent be *void*." 45 U.S.C. § 55 (emphasis added). The OWBPA, by contrast, does not render contractual waivers "void," but merely requires them to be "knowing and voluntary" under specified standards. 29 U.S.C. § 626 (f)(1). Thus, *Hogue* provides no support for petitioners' proposed construction of the OWBPA to foreclose application of the doctrines of ratification and estoppel in the ADEA context.

c. Petitioners also complain that application of the doctrines of ratification and estoppel would produce interstate disuniformity. Pet. 13. The court below, however, simply did not decide whether state or federal common law standards should govern in this area. Thus, the possibility of varying state standards is only speculative, and the "preemption" issue discussed by petitioners (Pet. i, 22, 27) simply is not presented in this case. Moreover, even if state common law standards did apply, there is nothing unusual about incorporating state law in order to "fill the interstices of federal remedial schemes." *Kamen v. Kemper Financial Servs., Inc.*, 500 U.S. 90, 98 (1991). *See also United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979). Finally, as Chief Judge Posner of the Seventh Circuit has explained, since ratification is a widely-followed doctrine, it would "surely" apply under *either* federal or state common law. *Fleming*, 27 F.3d at 260-61.

d. Petitioners also advance a series of "purpose" and "policy" arguments (Pet. 18-20, 23-27) that amount to a thinly-veiled contention that the doctrines of ratification and estoppel are unwise and unfair. Of course, these arguments are all legally irrelevant, since the pertinent question is not the wisdom or fairness of these doctrines, but whether the OWBPA has " 'directly' " abrogated them. *See United States v. Texas*, 113 S. Ct. at 1634 (citation

omitted). Even on their own terms, however, petitioners' policy arguments lack merit.

To begin with, petitioners suggest that the doctrines of ratification and estoppel somehow "encourage" violations of the waiver provisions of the OWBPA. Pet. 13. But employers who seek releases in exchange for cash payments would hardly welcome the prospect of litigation restored by a return of those payments. Rather, like respondents here, such employers seek to obtain a lasting release and freedom from future litigation—which they can ensure, if at all, only by attempting to comply with the OWBPA. Petitioners' contrary and unsupported allegations about likely employer behavior are not only self-serving, but also fanciful.

Petitioners likewise err in suggesting that application of the doctrines of ratification and estoppel is unnecessary because compliance with the OWBPA is simple. Pet. 19. This case provides a textbook example of the difficulty of avoiding litigation on the question whether a waiver is "knowing and voluntary." Even though respondents gave petitioners notices and proposed releases "in letter perfect compliance" with the OWBPA (Pet. App. 11a n.9), and even though the releases contained an integration clause expressly excluding any "written or oral" statement not "set forth in" the applicable documents (Opp. App. 3a), petitioners were able to create a factual dispute simply by alleging that the notices had been "orally countermanded" (Pet. App. 7a). Moreover, even if petitioners had conceded respondents' "letter perfect compliance" with the specific statutory requirements, since those requirements define only "minimum" standards (29 U.S.C. § 626(f)(1)), petitioners still could have alleged, as in fact they did, that their releases were not "knowing and voluntary" in any event. Thus, absent the doctrines of ratification and estoppel, employers predictably would face "continued litigation" from employees who could use, in order to finance their lawsuits, "the very

funds . . . paid as consideration to avoid litigation." Pet. App. 11a-12a & n.9. As the court of appeals recognized, employers in such circumstances clearly would be "disinclined" to propose releases as a means of promptly and voluntarily settling their prospective disputes. Pet. App. 11a. And that result, as Chief Judge Posner has explained, would harm both employers and employees in the long run. *See Fleming*, 27 F.3d at 261.

Finally, petitioners raise the specter of substantial unfairness when claims are barred on the basis of "minimal" (Pet. 13) or "token" (Pet. 20) consideration. But that result is utterly implausible, for employees seeking to challenge such releases, in order to avoid a ratification or estoppel bar, need only return the "minimal" or "token" consideration upon either learning that the release might be voidable or deciding to challenge it as such.[6]

II. THE ALLEGED CIRCUIT CONFLICT IS NOT APPROPRIATE FOR REVIEW AT THIS TIME

Petitioners also argue that this Court should grant certiorari to resolve an alleged split between the Fifth Circuit decision in this case and the Seventh Circuit decision in *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 679 (1994). In *Oberg*, a Seventh Circuit panel held that an ADEA plaintiff need not tender back the consideration paid to him for an allegedly invalid release in order to proceed with a lawsuit. *See id.* at 683. While the court of appeals

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[6] Petitioners also appear to embrace the contradictory argument, advanced in the unpublished district court opinion in *Oberg v. Allied Van Lines*, No. 91-C-6576, 1992 WL 211506, at *5 (N.D. Ill. Aug. 26, 1992), *aff'd*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994), that employees are unlikely to be able to return *generous* consideration and, therefore, operate under a kind of duress. Pet. 25. It is clear, however, that economic pressure alone cannot constitute duress. *See, e.g., Cirillo v. Arco Chemical Co.*, 862 F.2d 448, 452 n.2 (3d Cir. 1988); *Constant v. Continental Tel. Co.*, 745 F. Supp. 1374, 1384 (C.D. Ill. 1990).

below acknowledged its "respectful disagreement" with *Oberg* (Pet. App. 14a n.11), petitioners err in suggesting that the judicial disagreement justifies or requires review by this Court at this time.

To begin with, this Court already has decided that the precise judicial disagreement alleged by petitioners does not presently warrant further review. A petitioner in *Oberg* sought review in this Court on the identical OWBPA question presented here. *See* Petition for Certiorari, *Allied Van Lines v. Oberg*, No. 93-1605, at (i) (U.S. filed April 11, 1994). The petitioner there, like petitioners here, alleged that the Fifth Circuit in this case had "reached a diametrically opposite result, and expressly declined to follow," the Seventh Circuit decision in *Oberg*. *See id.* at 11. Nonetheless, just eight months ago, this Court denied certiorari. 114 S. Ct. 2104.

Moreover, petitioners would have this Court undertake the extraordinary course—rejected in *Oberg* itself—of deciding an issue as yet addressed by only two of the United States Courts of Appeals, and by none of the fifty state supreme courts. Ordinarily, however, this Court does not seek to resolve splits of authority until several of the lower appellate courts have addressed the question at issue. Indeed, according to Justice Brennan, this Court for over four decades has followed a policy of "letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question." Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 233 (1983). This approach allows "percolation"—an important " 'period of exploratory consideration and experimentation by lower courts before [this Court] ends the process with a nationally binding rule.' " *California v. Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting) (citation omitted). Respect for this process has supported denials of certiorari in cases presenting questions far more important than this one. *See, e.g., Perry v. Louisiana*, 461 U.S. 961, 963 (1983) (Stevens, J., for three Justices concurring in the denial of

certiorari) (constitutional challenges to race-based use of peremptory challenges needed "further study" in the lower courts). Indeed, it has even supported specific outcomes on the merits. *See, e.g., United States v. Mendoza*, 464 U.S. 154, 160 (1984) (rejecting nonmutual collateral estoppel against the government because it would "deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before [it] grants certiorari").

Of course, the preference for permitting an issue to percolate is not absolute. This Court sometimes grants certiorari, for example, where two courts of appeals are split on the validity of an important federal statute or regulation. *See, e.g., Thomas Jefferson Univ. Hosp. v. Shalala*, 114 S. Ct. 2381, 2386 (1994). And, recently, this Court granted certiorari after two courts of appeals had applied inconsistent standards to a single interstate compact entity—in the only two states (and circuits) where the entity could operate. *See Hess v. Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394, 397 (1994). But petitioners do not, and could not, contend that this case involves any such unusual circumstances.

Instead, petitioners suggest only that this Court should deviate from its usual practice in order to avoid "years" of additional litigation in the lower courts about the question presented. Pet. 15. But, as petitioners themselves note (Pet. 21), two district courts already have addressed the question of ratification under the OWBPA since the appellate decisions in this case and *Oberg*. *Blistein v. St. John's College*, 860 F. Supp. 256, 259-62 (D. Md. 1994); *Raczak v. Ameritech Corp.*, No. 93-72697, 1994 U.S. Dist. LEXIS 13076, *26-*28 (E.D. Mich. Aug. 1, 1994). The ratification issue addressed in these decisions is currently pending before the Fourth and Sixth Circuits, respectively. *See* Brief of Appellees at 41-46, *Blistein v. St. John's College*, No. 94-2223 (4th Cir. Dec. 16, 1994); Petition For Permission to Appeal Under 28 U.S.C.

§ 1292(b), at 15, *Raczak v. Ameritech Corp.*, No. 93-CV-72697-DT (6th Cir. Dec. 2, 1994). Petitioners offer no sound reason why this Court should not wait for the benefit of these decisions, or those of other courts of appeals.

Finally, because the Seventh Circuit in *Fleming* recently signalled its possible retreat from the position taken by the *Oberg* panel, the case for granting certiorari here is even weaker than it was in *Oberg* itself. As Justice Harlan has explained, certiorari should be denied "where it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals." Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108, 112 (1959). That is the situation here.

In *Fleming*, the Seventh Circuit applied traditional principles of ratification and estoppel to bar a plaintiff's federal statutory claims for race, sex and handicap discrimination. Speaking through Chief Judge Posner, a unanimous panel (Eshbach and Easterbrook, JJ.) cited the Fifth Circuit decision in this case—with approval—for the proposition that "a release can be rescinded only upon a tender of any consideration received." 27 F.3d at 260-61. The Seventh Circuit held that, because this rule is a widely accepted "general principle of contract law," it "would surely be a component of any federal common law of releases." *Id.* The Seventh Circuit explained in detail how this rule, by making releases more valuable to employers, and thus encouraging voluntary settlements, helps both employers and employees in the long run. *See id.* at 261. Addressing age discrimination cases specifically, the Seventh Circuit noted that the common law rule "*may* have to give way," but it noted that the Fifth Circuit decision in this case had "strongly criticized our decision in *Oberg*." *Id.* (emphasis added). Indeed, the Seventh Circuit went so far as to characterize *Oberg*'s reasoning as "a little obscure to us." *Id.*

There is, therefore, a significant question about whether *Oberg* will survive within its own circuit. Accordingly, petitioners' claim that this Court must now resolve an alleged split with *Oberg* is clearly premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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